General Counsel's Supplemental Report
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Public Employment Relations Commission

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Appeals From Commission Decisions

Unfair Practice Cases

In *Piscataway Tp. Ed. Ass'n v. Piscataway Tp. Bd. of Ed.*, 307 *N.J. Super*. 263 (App. Div. 1998), pet. for certif. pending, an Appellate Division panel effectively overruled an unpublished Appellate Division decision, *Edison Tp. Bd. of Ed. v. Edison Tp. Ed. Ass'n*, *NJPER Supp*.2d 66 (¶47 App. Div. 1979), certif. den. 82 *N.J*. 274 (1979), and held that impact issues related to school calendar changes caused by inclement weather are not automatically non-negotiable. The Court remanded the case to the Commission to determine issue-by-issue whether negotiations would significantly interfere with the prerogative to determine the school calendar. A longer discussion of *Edison* and *Piscataway* follows.

In *Edison*, an Appellate Division panel reversed a Commission decision, P.E.R.C. No. 79-1, 4 *NJPER* 302 (¶4152 1978), and held non-negotiable all impact issues arising from school calendar changes caused by inclement weather and affecting teachers. The panel relied upon *In re Maywood Bd. of Ed.*, 168 *N.J. Super*. 45 (App. Div. 1979), certif. den. 81 *N.J*. 292 (1979), in reaching that sweeping holding.

In a 1995 inclement weather/school calendar case, the Commission applied *Edison* to bar negotiations over impact issues involving teachers because it was an Appellate Division decision on point. *Middletown Tp. Bd. of Ed.*, P.E.R.C. No. 96-30, 21 *NJPER* 392 (¶26241 1995).[1] The Commission declined to consider whether that on-point holding had

[1] The Commission, however, held that secretaries could seek to arbitrate a claim that they had been required to work five extra days and should be paid for that work.

been analytically undercut by *Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n*, 81 *N.J.* 502 (1980) and *City of Elizabeth v. Elizabeth Fire Officers Ass'n*, 198 *N.J. Super*. 382 (App. Div. 1985), cases which permitted negotiations over issues arising from the exercise of managerial prerogatives. The Commission's circumspect approach in *Middletown* was consistent with other cases where the agency has followed on-point holdings of Appellate Division decisions that have reversed Commission decisions, even though those holdings have been questioned by later cases. *See Monmouth Cty. and CWA*, P.E.R.C. No. 95-47, 21 *NJPER* 70 (¶26050 1995), aff'd 300 *N.J. Super*. 272 (App. Div. 1997) (declining to restrain arbitration of minor disciplinary disputes based on holding in *CWA v. PERC*, 193 *N.J. Super*. 658 (App. Div. 1984), despite dictum in *State v. State Troopers Fraternal Ass'n*, 134 *N.J.* 393 (1993), questioning that holding).

In the *Piscataway* case itself, the school board adopted a calendar stating that if extra school days were required because of inclement weather, they would be added at the end of June. A series of snowstorms occurred in 1995 and the Board decided to cancel the spring recess. The Association then demanded to negotiate over both the school calendar change and any impact issues arising from that change. The Board refused to negotiate, but unilaterally adjusted its vacations and personal leave policies to alleviate the "severe consequences" that some employees would have suffered. The Association filed an unfair practice charge which a Hearing Examiner dismissed. He found that the Board had a contractual right to change the school calendar and a managerial prerogative, given *Edison* and *Middletown*, to refuse to negotiate over any impact issues. H.E. No. 96-22, 22 *NJPER* 228 (¶27119 1996).

The Association did not seek Commission review so the Hearing Examiner's report became the agency's decision pursuant to *N.J.A.C.* 19:14-8.2. The Association then appealed to the Appellate Division. The Commission filed a statement in lieu of brief noting that no exceptions had been filed, but the Court then asked the Commission to file a brief on whether *Woodstown-Pilesgrove* affected *Edison*'s precedential value. The Commission filed a brief explaining that it had followed *Edison* because its holding was on point, but also reviewing *Woodstown-Pilesgrove*, *Elizabeth*, and other

cases permitting negotiations over terms and conditions of employment so long as negotiations would not significantly interfere with the exercise of a managerial prerogative. The Board filed a responsive brief that did not disagree with the Commission's analysis and that argued instead that any holding rejecting *Edison* should be applied prospectively only.

The Appellate Division panel (Judges Long, Stern, and Kleiner) elected not to follow *Edison* given *Woodstown-Pilesgrove* and *Elizabeth*. The Court also limited *Maywood* to its facts showing that no issues had been raised that could be negotiated without frustrating the employer's prerogative to reduce its work force. Under the Court's opinion, an impact issue is mandatorily negotiable if it does not significantly interfere with a related prerogative.

The Board then asked for reconsideration. The Board did not ask the Court to reconsider that part of its decision rejecting *Edison*; instead it reiterated its argument that the Court should apply that holding prospectively only. The Court granted reconsideration, but denied the request not to apply its holding to the parties. It noted that its decision was consistent with *Woodstown-Pilesgrove*; an order to negotiate would simply put the Board in the same position it would have been in had it initially observed *Woodstown-Pilesgrove*; and the prevailing party was entitled to the benefit of its litigation labors. The Court also rejected a contention that the Hearing Examiner had held that the Board had a contractual right to refuse to negotiate over impact issues.

The Board has filed a notice of its intention to petition for certification.

Interim Relief Orders

In *Wildwood City Bd. of Ed. and Wildwood Ed. Ass'n*, I.R. No. 98-13, 24 *NJPER* 32 (¶29018 1992), a Commission designee ordered the employer to pay teachers salary and longevity increments during negotiations to replace a one-year contract. An Appellate Division panel denied leave to appeal from that order.

Scope of Negotiations Cases

In *Wayne Tp. and AFSCME Council 52, Local 2274*, P.E.R.C. No. 97-74, 23 *NJPER* 42 (¶28029 1996), the Commission declined to restrain arbitration of a grievance asserting that a qualified employee was improperly denied an overtime assignment.

That assignment was given instead to an employee whom the employer had taken off the overtime list for backhoe assignments. The Commission held that the overtime allocation dispute was legally arbitrable and an Appellate Division panel agreed. App. Div. Dkt. No. A-2795-96T1 (2/6/98).

Other Cases

The New Jersey Supreme Court has upheld a 48-day unpaid suspension of a firefighter. The firefighter was found guilty of directing a racial epithet at an on-duty police officer. The epithet was not protected by the First Amendment. *Karins v. City of Atlantic City*, __ *N.J.* __ (1998). The Court also held that a disciplinary regulation proscribing "conduct unbecoming an Atlantic City firefighter" was not unconstitutionally vague or overbroad.

Petitions for certification have been denied in *CWA v. Whitman*, 298 *N.J. Super*. 162 (App. Div. 1997), certif. den. 152 *N.J.* 191 (1997) (discussed in my annual report at p. 15) and *Keyport Teachers' Ass'n v. Keyport Bd. of Ed.*, 299 *N.J. Super*. 649 (App. Div. 1997), certif. den. 152 *N.J.* 192 (1997) (discussed in my annual report at p. 13).

The Appellate Division has applied the principles set forth in *Payton v. New Jersey Turnpike Auth.*, 148 *N.J.* 524 (1997) (discussed in my annual report at p. 16), to permit discovery of sexual harassment complaints and internal investigations involving other employees besides a plaintiff and other supervisors besides a defendant.